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No. 85-31

In the Supreme Court of the United States

OCTOBER TERM, 1985

BUENTA M. OWENS AND KENNETH R. OWENS, ET AL., CROSS-APPELLANTS

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether, in this nationwide class action challenging the constitutionality of certain provisions of the Social Security Act, the district court correctly excluded from the class individuals who no longer had live claims for benefits pending before the Secretary of Health and Human Services when this suit was filed.

2. Whether the district court erred in denying cross-appellants' application for attorney fees, without prejudice to their renewing it after this Court has ruled on the merits of the Secretary's direct appeal.

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Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Health and Human Services, moves that the judgment and order of the district court challenged by cross-appellants be affirmed.

OPINIONS BELOW

The order of the district court certifying the class (84-1905 J.S. App. 13a-28a) is unreported. The order of the district court denying cross-appellants' motion for attorney fees (85-31 J.S. App. 5a) is unreported. The order of the district court holding the relevant provisions of the Social Security Act unconstitutional (84-1905 J.S. App. 30a-43a) is unreported.

JURISDICTION

The judgment of the district court (84-1905 J.S. App. 44a-46a) was entered on December 20, 1984, and the order of the district court denying the Secretary's motion for reconsideration (84-1905 J.S. App. 47a) was entered on February 6, 1985. The notice of appeal to this Court was filed on behalf of the Secretary on March 7, 1984 (84-1905 J.S. App. 48a), and an amended notice of appeal was filed on March 9, 1985) (84-1905 J.S. App. 49a). The order of the district court denying cross-appellants' application for attorney fees was entered on April 1, 1985 (85-31 J.S. App. 5a). By order dated April 30, 1985, Justice Rehnquist extended the time within which to docket the Secretary's direct appeal to and including June 5, 1985 and the direct appeal was docketed on that date. The cross-appeal was docketed on July 5, 1985. See Sup. Ct. R. 12.4. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATEMENT

The Secretary of Health and Human Services has filed a direct appeal (No. 84-1905) under 28 U.S.C. 1252 in this case, challenging (i) the district court's invalidation of provisions of the Social Security Act in effect between 1979 and 1983 that permitted widowed spouses, but not surviving divorced spouses, to receive survivors benefits if they remarried after reaching age 60; and (ii) the district court's granting of relief to unnamed class members who did not exhaust their administrative remedies or who received a final decision of the Secretary denying their claims more than 60 days prior to the filing of this action. The statutory and regulatory framework and the statement of the case are set forth in the jurisdictional statement (at 2-11) filed in No. 84-1905.

1. In this cross-appeal, cross-appellants first challenge the district court's denial of their motion to include additional claimants in the nationwide class to which the court

awarded relief. See 85-31 J.S. 6-9, 10-12. The district court included in the class all those surviving divorced spouses who remarried after age 60 and who either filed applications for survivors benefits on or after August 20, 1982, or filed applications for benefits prior to August 20, 1982 that were still pending at some level of the administrative review process on that date. August 20, 1982 was selected because it was 60 days prior to the date on which one of the class representatives, Buenta Owens, filed her request for administrative reconsideration of the initial denial of her claim for benefits. In the district court's view, this administrative request by a single claimant sufficiently put the Secretary on notice of the nature of the constitutional contention that the filing of that request should be deemed to have tolled the running of the 60-day period during which any similarly situated claimant in the United States could file an action for judicial review under 42 U.S.C. 405(g). 84-1905 J.S. App. 20a-22a.

Cross-appellants argued in district court that the class should be defined even more broadly to include every claimant who was denied benefits on the basis of the challenged statutory provisions at any time during the four-year period beginning on January 1, 1979. See 85-31 J.S. 8-9. As cross-appellants acknowledge (*ibid.*), the district court necessarily rejected that contention when it certified a class with a beginning date of August 20, 1982.

2. Cross-appellants also seek review of the district court's denial without prejudice of their application for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). See 85-31 J.S. 12-14. On March 6, 1985, within 30 days of the date on which the district court's judgment became final by virtue of that court's denial of the Secretary's motion for reconsideration, cross-appellants filed a motion for attorney fees. Cross-appellants argued that they were entitled to fees because they were the

prevailing parties and because, in their view, the Secretary's position in defending the constitutionality of the challenged statutory provisions and opposing the district court's award of relief to a nationwide class was not "substantially justified" within the meaning of 28 U.S.C. 2412(d). 85-31 J.S. 9-10. In a brief order dated April 1, 1985, the district court denied the motion for attorney fees, without prejudice to cross-appellants' right to reapply for fees after this Court rules on the merits of the Secretary's direct appeal (85-31 J.S. App. 5a).

ARGUMENT

The issues raised in this cross-appeal are so insubstantial as not to warrant plenary review by this Court. The Court therefore should summarily affirm the judgment of the district court insofar as it rejects cross-appellants' motion to include within the class persons who did not have claims for benefits pending on August 20, 1982, and it also should summarily affirm the district court's April 1, 1985 order denying cross-appellants' motion for attorney fees.

1. Cross-appellants assert (85-31 J.S. 11-12) that the Court should note probable jurisdiction of their cross-appeal on the class certification issue, if it notes probable jurisdiction of the Secretary's direct appeal insofar as it challenges the class certification.[1] However, cross-appellants present no argument on the merits of their cross-appeal on the class certification issue, thereby wholly failing

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[1]Cross-appellants first argue (85-31 J.S. 12-13), however, that the Court does not have jurisdiction of the Secretary's direct appeal under the first paragraph of 28 U.S.C. 1252 or of their cross-appeal under the second paragraph of Section 1252 insofar as those appeals challenge the district court's class certification. Cross-appellants argue that this Court has jurisdiction under Section 1252 only over the constitutional issues in the case. Cross-appellants make this same argument in their motion to dismiss or affirm (at 23-26) the Secretary's direct appeal in No. 84-1905. We have sufficiently answered that argument in our reply brief (at 5-7) in No. 84-1905 and in our discussion at pages 8-11, *infra*, of the Court's jurisdiction of the appeal from the district court's denial of attorney fees.

to explain how the district court could have had jurisdiction under 42 U.S.C. 405(g) over persons whom it declined to include in the class. Cross-appellants therefore have not complied with the requirements of Rule 15.1(h) of the Rules of this Court, which is made applicable to cross-appeals by Rule 12.4. Rule 15.1(h) requires that a jurisdictional statement contain "[a] statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution." For this reason alone, the Court should dispense with plenary consideration of the cross-appeal and either dismiss the cross-appeal or summarily affirm the district court's judgment insofar as the cross-appeal seeks review of the district court's refusal to include additional persons in the class.

There is, in any event, no merit to this aspect of the cross-appeal. As we have explained in the jurisdictional statement (at 21-25) in No. 84-1905, the district court clearly erred in awarding relief to class members who failed to obtain judicial review within 60 days of the Secretary's "final decision" on their claims for benefits, as required by 42 U.S.C. 405(g). The district court's novel holding—under which the running of the 60-day period for seeking *judicial* review was tolled for all similarly situated claimants on a nationwide basis from the date on which a single claimant, Buenta Owens, filed a request for *administrative* reconsideration of the initial denial of her claim—is inconsistent with the text and purposes of 42 U.S.C. 405(g), the decisions of this Court, and the principles of sovereign immunity that govern the interpretation of statutory limitations on Congress's consent to suits against the federal government. As we point out in our reply brief (at 5) in No. 84-1905, cross-appellants make essentially no effort in their motion to dismiss or affirm in No. 84-1905 to rebut our submission in this regard.

If, as we submit, the district court plainly erred in including within the class any individuals who could be thought to have complied with the 60-day filing requirement only by reason of that court's novel tolling rule, it follows a *fortiori* that there is no merit to the bare assertion in this cross-appeal that the district court also should have included within the class numerous additional claimants for whom there is not even a pretense that they complied with the 60-day filing requirement, by virtue of a tolling rule or otherwise. Cross-appellants' position apparently is that a court can altogether *disregard* the explicit 60-day filing requirement that Congress has imposed as a limitation on its consent to suit under 42 U.S.C. 405(g). But even if cross-appellants were correct that this 60-day filing requirement is not jurisdictional in the strictest sense (but see 84-1905 J.S. 23-24), that conclusion would not authorize a district court simply to disregard the 60-day requirement. See *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., concurring and dissenting). Statutorily mandated limitations on the time within which a person may bring suit against the federal government must be strictly construed and enforced by the courts. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). The class certification issue presented in the cross-appeal therefore is frivolous.

2. a. The second issue cross-appellants raise—whether the district court properly denied their motion for attorney fees under the EAJA—likewise does not warrant plenary review by this Court. If this Court reverses the judgment of the district court on the Secretary's direct appeal, as we urge it to do, cross-appellants would not be "prevailing part[ies]" within the meaning of the EAJA. See 28 U.S.C. 2412(d)(1)(A). In that event, the order of the district court denying the application for attorney fees should be summarily affirmed on the ground that cross-appellants are not entitled to fees under the EAJA.

However, the Court also should summarily affirm the district court's order denying the application for fees even if this Court were to affirm the judgment of the district court, in whole or in part, on the Secretary's direct appeal. The district court denied the fee application without prejudice to cross-appellants' renewing it after this Court has ruled on the Secretary's direct appeal (85-31 J.S. App. 5a). Cross-appellants' acknowledge (85-31 J.S. 3 n.3, 13-14) that they have taken a cross-appeal from the denial of fees only as a protective measure. That course was necessitated by the controlling interpretation of the EAJA at the time the district court entered its attorney fee order. Under 28 U.S.C. 2412(d)(1)(B), a fee application must be filed "within thirty days of final judgment in the action." The Ninth Circuit held in *McQuiston* v. *Marsh,* 707 F.2d 1082, 1085 (1983), that the "final judgment" referred to in this provision is the judgment of the district court, and that a fee application therefore must be filed within 30 days of that judgment even if an appeal has been taken. According to cross-appellants (85-31 J.S. 3 n.3), they filed their application for attorney fees in this case within 30 days of the date on which the district court's judgment became final, even though the Secretary had taken a direct appeal to this Court, in order to comply with the Ninth Circuit's ruling in *McQuiston.*

After the cross-appeal was docketed in this case, however, Congress overturned the *McQuiston* rule. In Section 2 of Pub. L. No. 99-80, 99 Stat. 184—the recently enacted legislation extending the EAJA—Congress added a new Subsection (G) to 28 U.S.C. 2412(d)(2), which defines the term "final judgment" to mean "a judgment that is final and not appealable." The legislative history makes clear that under this definition, the 30-day period for filing a fee application commences with the date on which any proceedings in an appellate court are terminated. See H.R. Rep. 99-120, 99th Cong., 1st Sess. 18 n.26 (1985). Section

7(a) of Pub. L. No. 99-80, 99 Stat. 186, in turn provides that the EAJA amendments "shall apply to cases pending on * * * the date of enactment of this Act." Because this case was "pending" on the merits in this Court on the date of enactment of the EAJA amendments, this new definition of the term "final judgment" applies to this case. As a result, if this Court were to affirm the district court's holding that the relevant provisions of the Social Security Act are unconstitutional, cross-appellants would be free under the amended EAJA to submit a new application for attorney fees within 30 days of the date on which this Court's judgment became final. The district court's order denying cross-appellants' motion for attorney fees, without prejudice to their refiling after this Court has ruled, therefore should be affirmed.[2]

b. There is one issue that remains to be addressed. As cross-appellants point out (85-31 J.S. 4, 13), the Ninth Circuit held in *League of Women Voters* v. *FCC*, 751 F.2d 986 (1985), that even where a direct appeal has been taken to this Court pursuant to the first paragraph of 28 U.S.C. 1252 from a decision of a district court holding an Act of Congress unconstitutional, an appeal from the district court's denial of an application for attorney fees under the EAJA must be taken to the court of appeals pursuant to 28 U.S.C. 1291, not to this Court pursuant to the second paragraph of 28 U.S.C. 1252. If the Ninth Circuit's decision in *League of Women Voters* were correct, then the court of appeals, rather than this Court, would have jurisdiction of cross-appellants' appeal from the district court's denial of their

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[2]In the alternative, if the Court were to affirm the district court's judgment on the constitutional question, the Court might vacate the district court's order denying the fee application and remand with instructions to reinstate that application. The legislative history of the 1985 EAJA amendments indicates that an application for attorney fees may be filed before the "final judgment" and that the district court should hold such an application and treat it as having been filed within 30 days following the final decision. H.R. Rep. 99-120, *supra*, at 18 n.26.

application for attorney fees in this case.[3] Accordingly, if this Court agrees with the Ninth Circuit's decision in *League of Women Voters,* the Court should dismiss the cross-appeal for lack of jurisdiction insofar as it seeks review of the district court's order on the attorney fee question.

However, in our view, the court of appeals' jurisdictional holding in *League of Women Voters* is clearly wrong. The second paragraph of 28 U.S.C. 1252 provides that "[a] party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court." By virtue of this explicit language, whenever one party to a case has taken a direct appeal to this Court from a district court's holding of an Act of Congress unconstitutional, "any" subsequent appeal or cross-appeal must be taken to this Court as well. This all-inclusive language embraces an appeal from an order denying an award of attorney fees. It is irrelevant for purposes of this Court's jurisdiction that the attorney fee issue does not directly concern the constitutionality of an Act of Congress. The quoted language in the second paragraph of Section 1252 necessarily applies only to appeals and cross-appeals that do not concern the district court's constitutional holding, because any appeal or cross-appeal challenging that holding would have to be taken directly to this Court pursuant to the first paragraph of Section 1252. Moreover, this construction of the second paragraph of Section 1252 substantially furthers the interest in a "clear test" for determining this Court's jurisdiction under 28 U.S.C. 1252 (see *Heckler* v. *Edwards,* No. 82-874 (Mar. 21, 1984), slip op. 6), because it avoids the necessity under the *League of Women Voters*

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[3]In light of *League of Women Voters,* cross-appellants in fact have taken a protective appeal to the court of appeals from the order denying their application for attorney fees. See 85-31 J.S. 3.

analysis to pick and choose among various issues to determine whether they must be appealed to this Court or to the court of appeals.

The court of appeals in *League of Women Voters* decided that the second paragraph of Section 1252 should not be construed in this manner because of this Court's holding in *Edwards* that the first paragraph of 28 U.S.C. 1252 confers jurisdiction on this Court only if the appellant actually challenges the district court's constitutional holding. See 751 F.2d at 988-989. However, the Court's decision in *Edwards* addressed the distinct threshold question of when this Court's jurisdiction under 28 U.S.C. 1252 attaches at all. Slip op. 8-15. The Court made clear that when that jurisdiction has attached—*i.e.*, when an appeal is taken pursuant to the first paragraph of Section 1252 to challenge the district court's holding of an Act of Congress unconstitutional—"the second paragraph brings before [the Court] the whole case, including appeals filed before and after the constitutional appeal." *Edwards,* slip op. 9 (footnote omitted). The Court expressly contemplated that the other issues that must come to this Court as part of the "whole case" include such "pendent" questions as the award of attorney fees. Slip op. 8, 14. Resolution of these nonconstitutional issues, the Court explained, "not only implement[s] Congress's jurisdictional intent expressed in paragraph two of 28 U.S.C. § 1252," but also results in the "just, speedy, and inexpensive determination of actions." Slip op. 9 n.12.

This approach is especially sound as regards the award of attorney fees. Eligibility for fees under the EAJA turns as an initial matter on whether the Secretary's position on the merits was "substantially justified." The fee question therefore is directly related to the merits of the controversy, including the constitutionality of the Act of Congress. Separation of powers concerns also are implicated (compare *Edwards,* slip op. 10-11, 13), because a fee application in

such a case necessarily asks the Judiciary to hold that the Executive should not even have defended the constitutionality of a statute duly enacted by Congress. See *Grace* v. *Burger,* 763 F.2d 457, 458 n.5 (D.C. Cir. 1985).

For the foregoing reasons, where a direct appeal has been taken to this Court pursuant to the first paragraph of 28 U.S.C. 1252, this Court has jurisdiction under the second paragraph of 28 U.S.C. 1252 to hear an appeal from an order of the district court denying an application for attorney fees.

CONCLUSION

The judgment of the district court, insofar as it partially denied cross-appellants' motion for class certification, and the order of the district court denying cross-appellants' application for attorney fees should be summarily affirmed.

Respectfully submitted.

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